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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

~~Misc.~~ No. 1078

LOU JOHN LOUIS, JR.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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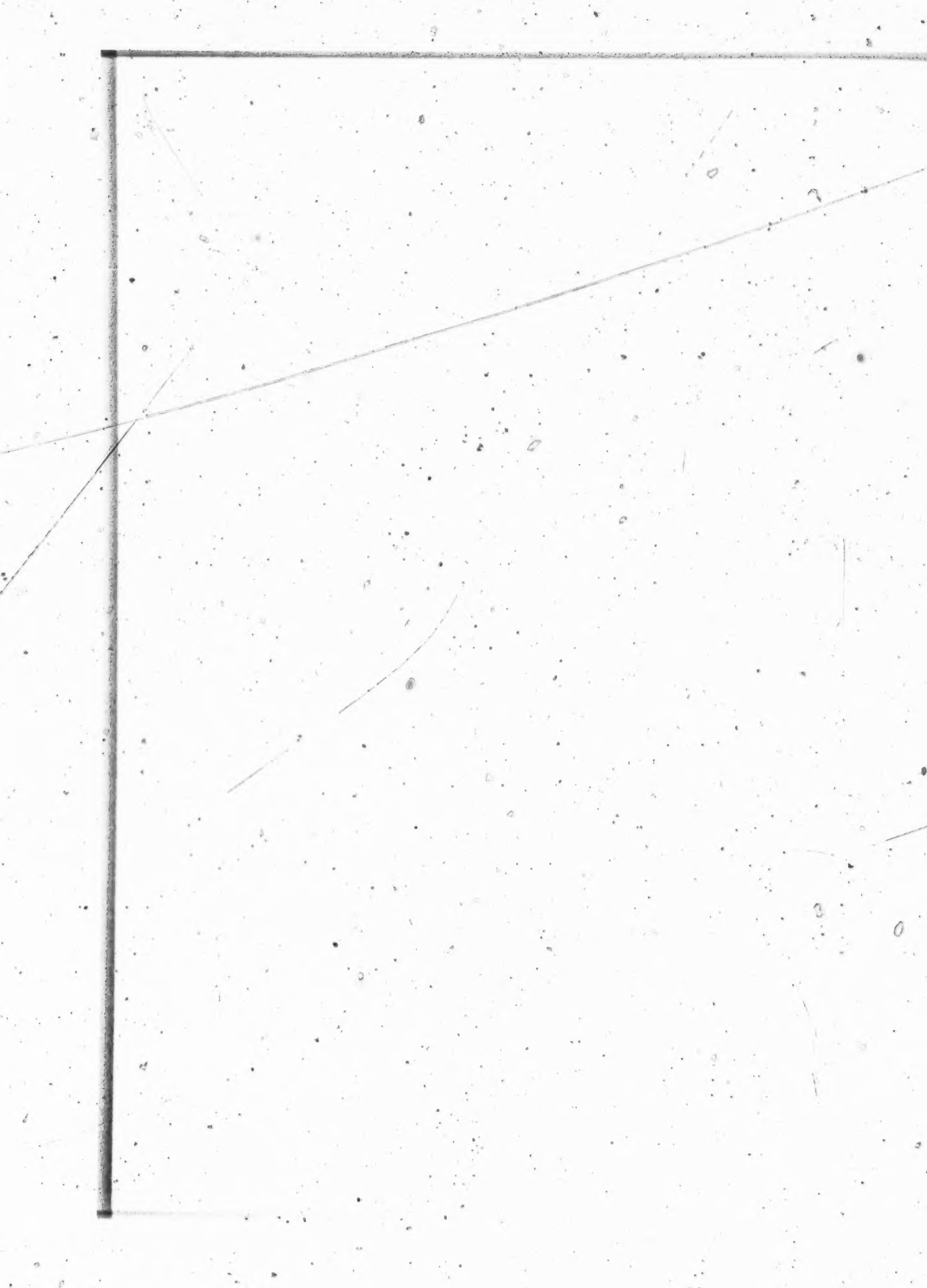

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

TO THE HONORABLE, THE CHIEF JUSTICE, AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petitioner, Lou John Louis, Jr., respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered in Case No. 17,682, of that Court, on December 7, 1967.

OPINION BELOW

The District Court, Middle District of Tennessee, Nashville Division, overruled the motion of the petitioner at trial to dismiss Count I of the indictment. Thereafter the cause proceeded to trial before a jury and to a finding of guilty and the petitioner was sentenced to an indeterminate period of time under the Youth Corrections Act on each of the two counts of the indictment, said sentences to run concurrently.

The opinion of the Court of Appeals affirming the judgment of the District Court has not been generally reported. A copy of this opinion is appended hereto as Appendix A.

STATEMENT OF JURISDICTION

The order of the Court of Appeals was entered on December 7, 1967. Mr. Justice Stewart has heretofore extended the time for petitioning for certiorari to and including February 5, 1968.

The jurisdiction to review the judgment is conferred on this Court by Title 28, U.S.C.A., § 1254 (1).

QUESTIONS PRESENTED

1. Should the District Court have sustained the petitioner's motion to dismiss Count I of the indictment herein, for the reason that petitioner's alleged co-conspirator had previously been discharged from the case on motion of the United States and on orders of the District Court and the petitioner stood charged alone in a conspiracy count.

2. Was there competent evidence for a finding of guilty as to Count II of the indictment if testimony as to a conspiracy as alleged in Count I of the indictment had been barred?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

"371. ***Conspiracy to commit offense or to defraud United States.*** If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do not act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

"If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor." United States Code Annotated, Title 18, § 371, page 5.

"641. ***Public money, property or records.*** Whoever embezzles, steals, purloins, or knowingly converts to his use or the use of another, or without authority, sells, conveys or disposes of any record, voucher, money or thing of value of the United States or of any department or agency thereof, or any property made or being made under contract for the United States or any department or agency thereof; or

"Whoever receives, conceals, or retains the same with intent to convert it to his use or gain, knowing it to have been embezzled, stolen, purloined or converted

"Shall be fined not more than $10,000 or imprisoned not more than ten years, or both; but if the value of such property does not exceed the sum of $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both." United States Code Annotated, Title 18, § 641, page 614.

STATEMENT OF THE CASE

The petitioner was charged in a two count indictment of violating the provisions of Title 18, U.S.C.A., Section 371 and Title 18, U.S.C.A., Section 641. The first count of the indictment alleged that in or about the month of September, 1963, the petitioner and one Richard Hunter Binkley willfully and knowingly combined, conspired, confederated and agreed together and with each other to commit an offense against the United States, namely, to violate the provisions of Title 18, U.S.C.A., Section 641. Thereafter, Count I of the indictment went into detail alleging the terms of the conspiracy and then alleged three overt acts in furtherance of the conspiracy.

Count II of the indictment charged the petitioner alone with the substantive offense of larceny of property belonging to the United States Army, rifle ammunition, of a value in excess of $100.00.

Thereafter, on April 7, 1965, the petitioner entered a plea of not guilty as to both counts of the indictment. Petitioner's co-defendant, Richard Hunter Binkley, at the same time entered a plea of not guilty as to Count I of the indictment, the only count in which he was charged, and on motion of the United States Attorney, Count I of said indictment was dismissed as to the defendant, Richard Hunter Binkley, and the District Court ordered that said "first count of the indictment as to the defendant, Richard Hunter Binkley, be and the same is hereby dismissed upon motion of the United States Attorney and the defendant, Richard Hunter Binkley, is hereby discharged from this case."

Thereafter, on July 14 and 15, 1966, the case was called for trial in the District Court as to the petitioner. Whereupon, petitioner moved that Count I of the indict-

ment be dismissed as to him in that his only alleged co-conspirator had been discharged from the case. The District Court overruled this motion. The chief witness for the government at the trial of the petitioner was his alleged co-conspirator, Richard Hunter Binkley, who was at the time of his testimony, on parole from a sentence imposed in the District Court at Nashville.

The trial of the petitioner proceeded to a jury finding of guilty, whereupon petitioner was sentenced by the District Court to an indeterminate sentence under the Youth Corrections Act under each of the two counts of the indictment, the sentences to run concurrently. At the trial of this cause, in the District Court, and before any evidence was adduced, petitioner moved the Court for an order of dismissal or acquittal as to Count I of the indictment. Such motion was based clearly on a question of law, however, the District Court refused to rule on the motion at that time and took the same under advisement. Thereafter, the District Court refused to rule on the motion and after a jury verdict of guilty, proceeded to sentence the petitioner. On motion for a new trial, the District Court overruled all grounds stated in the motion including this same ground that the motion at trial was based on.

The petitioner still maintained that Count I of the indictment against him should have been dismissed.

A conspiracy necessarily contemplates the confederation of two or more persons and it is elementary that one person cannot be convicted of conspiracy. It is also well settled law that where only two persons are charged with conspiracy, an acquittal of one defendant must result in the acquittal of the other.

In most conspiracy indictments, the prosecution will name certain individuals by name in the indictment and will follow this with a catch-all phrase, such as the following: "and others to the Grand Jury unknown," or "divers and sundry others to the Grand Jury unknown," or some other such phrase, and it has been consistently held that although all named conspirators save one be acquitted at trial, if the proof in the case indicates that there were other persons unnamed and unknown by the Grand Jury with whom the convicted defendant might reasonably be found to have conspired, then the conviction stands. *Donegan v. U.S.*, 287 Fed. 641; *McDonald v. U.S.*, 9 F. 2d 506; *Diventi v. U.S.*, 44 F. 2d 537.

In this case, the indictment in the First Count thereof alleged a conspiracy between petitioner and Richard Hunter Binkley, only. There was no charge in the indictment that there were others to the Grand Jury unknown. At the arraignment, Binkley entered pleas of guilty to certain counts of an indictment in Criminal Case No. 13,672 in the United States District Court for the Middle District of Tennessee, and entered a plea of not guilty in this case in which he was charged with the petitioner. Immediately upon his entry of the plea of not guilty, the U. S. Attorney moved that the indictment as to Binkley be dismissed, and the District Court entered the order of dismissal, above referred to, and discharged Binkley from the case. From and after that point, there was only the petitioner to be tried under this indictment.

It is further well settled that when an indictment is dismissed as to a defendant, that terminates any further proceedings against the defendant for the same set of circumstances unless at the time of the entry of the order of dismissal, defendant is expressly notified that he may later be reindicted; or in other words, unless the order

of dismissal specifically states that the dismissal is without prejudice to further prosecution, then the matter as to that defendant is terminated. *Dortch v. U.S.*, 203 F. 2d 209.

Therefore, at the time of the trial of the petitioner, he was the only defendant who could be tried under the indictment. Petitioner maintains that since the order of dismissal as to his co-defendant was with prejudice, that the same was tantamount to acquittal and therefore of necessity commands the acquittal of petitioner in the conspiracy count of this two count indictment.

Petitioner would show that the transcript of the proceedings of the trial have heretofore been filed with this Honorable Court and he believes it reasonable to assume that the proof necessary to prove a larceny would not necessarily be the same proof that would prove a conspiracy and that if proof of the conspiracy had been excluded from the jury, then he might reasonably have expected an acquittal as to Count II of the indictment. Petitioner further believes that it is reasonable to assume that the testimony required to prove a conspiracy might not, in toto, be required to prove larceny and that on proper motion made at the proper time, much of the testimony which was admitted at trial would have been excluded.

RELIEF

For the foregoing reasons, the petitioner respectfully submits that the writ of certiorari should be granted in this case.

Respectfully submitted,

NORMAN D. LANE,
1115 Stahlman Building,
Nashville, Tennessee,
Attorney for Petitioner.

APPENDIX A

No. 17682

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

United States of America,
Plaintiff-Appellee,

v.

Lou John Louis, Jr.,
Defendant-Appellant,

ORDER

[Filed December 7, 1967]

Before: WEICK, Chief Judge, EDWARDS, Circuit Judge, and CECIL, Senior Circuit Judge.

Defendant-Appellant, Lou John Louis, Jr., appeals from a judgment of conviction on a two-count indictment in the United States District Court for the Middle District of Tennessee.

Count one of the indictment jointly charged that the appellant and one Richard Huntley Binkley entered into a conspiracy to commit an offense against the United States, whereby the appellant would willfully and knowingly embezzle and steal and convert to his own use a large quantity of small arms ammunition, of a value in excess of $100, the property of the United States. (Section 641, Title 18, U.S.C.) The second count charged the substantive offense of the violation alleged in the first count of the indictment.

Upon motion of the United States Attorney, count one of the indictment was dismissed as to Richard Huntley

Binkley for the reason that the conspiracy alleged was a part of the same conspiracy charged against Binkley in Nashville Criminal No. 13672. Thereupon the appellant was tried before a jury and was found guilty upon both counts of the indictment. The appellant was sentenced to an indeterminate sentence under the Youth Corrections Act. (Section 5010(b), Title 18, U.S.C.)

It is assigned as error that the court should have dismissed count one of the indictment against the appellant for the reason that he could not be convicted of conspiracy after his co-defendant had been dismissed on the charge of conspiracy. It was further assigned as error that if count one were dismissed evidence introduced to support that count would be prejudicial against the appellant on the trial of count two.

Upon consideration of the record in the case, the briefs and oral arguments of counsel, we find the errors assigned by the appellant to be without merit. *United States v. Fox*, 130 F. 2d 56 (C.A. 3); *United States v. Shipp*, 359 F. 2d 185, 189 (C.A. 6).

IT IS THEREFORE ORDERED that the judgment of the District Court be and it is hereby affirmed.

Entered by order of the Court.

/s/ Carl W. Reuss
Clerk.

APPENDIX B

[Caption Omitted]

INDICTMENT

(Filed October 15, 1964)

COUNT ONE

The Grand Jury charges:

1. In or about the month of September, 1963, in the Nashville Division of the Middle District of Tennessee, Richard Hunter Binkley and Lou John Louis, Jr., willfully and knowingly did combine, conspire, confederate and agree together and with each other, to commit an offense against the United States, namely, to violate the provisions of Title 18, United States Code, Section 641.

2. It was a part of the plan and purpose of said conspiracy that Lou John Louis, Jr., would willfully and knowingly embezzle, steal, purloin and convert to his own use, a large quantity of small arms ammunition, of a value in excess of $100.00, of the goods and property of the United States which had come into the possession of Lou John Louis, Jr., by virtue of his employment as a soldier in the United States Army.

3. It was further a part of the plan and purpose of said conspiracy that Richard Hunter Binkley would receive from Lou John Louis, Jr., conceal and retain a large quantity of small arms ammunition, stolen by another, of a value in excess of $100.00, of the goods and property of the United States, with the intent to convert the same to his own use and gain, then knowing the aforesaid ammunition to have been embezzled, stolen and purloined.

OVERT ACTS

At the times hereinafter mentioned, the defendants committed the following overt acts in furtherance of said conspiracy and to effect the objects thereof:

1. In or about the month of September, 1963, in the Nashville Division of the Middle District of Tennessee, Lou John Louis, Jr., did deposit, at Clarksville, Tennessee, a large quantity of small arms ammunition.

2. In or about the month of September, 1963, in the Nashville Division of the Middle District of Tennessee, Lou John Louis, Jr., did deposit, at Clarksville, Tennessee, a large quantity of small arms ammunition.

3. In or about the month of September, 1963, in the Nashville Division of the Middle District of Tennessee, Richard Hunter Binkley did take possession of a large quantity of small arms ammunition.

In violation of Title 18, United States Code, Section 371.

COUNT TWO

And the Grand Jury charges:

In or about the month of September, 1963, in the Nashville Division of the Middle District of Tennessee, Lou John Louis, Jr., willfully and knowingly did embezzle, steal, purloin and convert to his own use, a large quantity of small arms ammunition, of a value in excess of $100.00, of the goods and property of the United States which had come into his possession by virtue of his employment as a soldier in the United States Army.

In violation of Title 18, United States Code, Section 641.

A TRUE BILL:

.....

FOREMAN

.....

United States Attorney

APPENDIX C

[Caption Omitted]

PLEA ON ARRAIGNMENT

(Filed April 7, 1965)

Came the United States Attorney and also came the defendant Richard Hunter Binkley in person and by his attorneys Fred Elledge, Jr., and Collier Goodlett, Jr.; also came the defendant Lou John Louis, Jr., in person and by his attorney S. Richard Schiffman.

The defendant Richard Hunter Binkley entered a plea of not guilty to the first count of the indictment, this being the only count in which he is charged in an indictment charging violation of Section 371, Title 18, United States Code.

The defendant Lou John Louis, Jr., entered a plea of not guilty to both counts of the indictment charging violation of Sections 371 and 641, Title 18, United States Code.

Thereupon the United States Attorney moved the Court to dismiss the first count of the indictment as to the defendant Richard Hunter Binkley, as the conspiracy alleged therein is a part of the same conspiracy charged in Nashville Criminal No. 13672.

It is hereby ORDERED by the Court that the first count of the indictment as to the defendant Richard Hunter Binkley be, and the same is hereby dismissed upon the motion of the United States Attorney, and the defendant Richard Hunter Binkley is hereby discharged from this case.

Upon the motion of the defendant Lou John Louis, Jr., it is hereby ORDERED by the Court that he is allowed twenty days within which to file pre-trial motions.

It is further ORDERED that this case, as to the defendant Lou John Louis, Jr., be set for trial at a later date.

Approved for Entry:

/s/ Thomas H. Shriver
Assistant U. S. Attorney

ENTER:

/s/ Wm. E. Miller
UNITED STATES DISTRICT JUDGE

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OCTOBER TERM, 1967

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,

FRED M. VINSON, JR.,
Assistant Attorney General,

BEATRICE ROSENBERG,
ROGER A. PAULEY,
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Department of Justice,
Washington, D. C. 20530.

In the Supreme Court of the United States

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LOU JOHN LOUIS, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Following a jury trial in the United States District Court for the Middle District of Tennessee, petitioner was convicted of violating 18 U.S.C. 371 by conspiring with one Binkley to steal and convert (in violation of 18 U.S.C. 641) a quantity of small arms ammunition belonging to the United States and worth more than $100, and of violating that substantive statute. He was sentenced to concurrent terms under the provisions of the Youth Corrections Act, 18 U.S.C. 5010(b) and 5017(c).

Petitioner's principal contention, as in the court below, is that the district court erred in refusing to dismiss the conspiracy count after the conspiracy charge against Binkley was dismissed on the government's motion at the plea stage.

At the arraignment petitioner pleaded not guilty to both counts of the indictment and Binkley pleaded not guilty to count 1, the only count in which he was named. The Assistant United States Attorney then moved for dismissal of count 1 as to Binkley, because the conspiracy alleged therein formed a part of another conspiracy charge pending against Binkley in the same court in a case which had been simultaneously called (Arr. Tr. 8).[1] When Binkley pleaded guilty to the other conspiracy charge (Arr. Tr. 9-11), the district court granted the government's motion to discontinue the similar charge in this case (Pet. App. C). Thereafter, petitioner unsuccessfully moved that count 1 of the present indictment be dismissed as to him, the case went to trial, and petitioner was convicted on both counts. The court of appeals affirmed (Pet. App. A).

Petitioner's theory is that, once the conspiracy count was dismissed as to Binkley, there was no one remaining with whom it was alleged he had conspired. Courts have treated a verdict of acquittal of an alleged co-conspirator as amounting to a finding that he was not a participant in the conspiracy, so that if only two persons are charged as members of

[1] "Arr. Tr." refers to the transcript of the arraignment proceedings, a copy of which is lodged with the Clerk of this Court.

the conspiracy the acquittal of one co-conspirator would necessitate acquittal of the other. See *e.g.*, *United States* v. *Gordon*, 242 F.2d 122, 125 (C.A. 3), certiorari denied, 354 U.S. 921. But the fallacy in petitioner's position is that it attempts to equate the dismissal of the conspiracy count on the government's pre-trial motion with the hypothetical situation of an acquittal of participation in the conspiracy. The government's recommendation that the conspiracy indictment be dismissed as to Binkley because he was about to plead guilty to a separate similar charge, clearly does not amount to a legal or logical determination of his non-involvement in the conspiracy, barring trial of his co-conspirator.[2]

As the court of appeals noted (Pet. App. A), convictions for conspiracy have been sustained where a nolle prosequi has been entered as to the only other alleged co-conspirator, *United States* v. *Fox*, 130 F. 2d 56, 57-59 (C.A. 3), certiorari denied, 317 U.S. 666; *United States* v. *Shipp*, 359 F.2d 185, 189 (C.A. 6), certiorari denied, 385 U.S. 903, and even where the other co-conspirator is immune from prosecution. *Farnsworth* v. *Zerbst*, 98 F.2d 541, 544 (C.A. 5). This case follows *a fortiori* from these decisions.

We point out, in addition, that there is no challenge to the sufficiency of the evidence on the sub-

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[2] Indeed, in this case, the existence of a conspiracy was confirmed at trial by Binkley's testimony that he had purchased stolen ammunition from petitioner, after petitioner had approached him and suggested the transaction (petitioner having heard that Binkley was in the business of buying stolen ammunition). Tr. 19-24, 32, 35 (lodged with the Clerk of this Court).

stantive count,[3] and the court imposed concurrent sentences on both counts.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

FRED M. VINSON, JR.,
Assistant Attorney General.

BEATRICE ROSENBERG,
ROGER A. PAULEY,
Attorneys.

MARCH 1968.

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[3] Petitioner asserts, however, that if count 1 was wrongly retained, his conviction on count 2 must also be reversed, since the evidence relating to the conspiracy might not have been relevant, in toto, to the substantive count. Petitioner makes no attempt, however, to suggest what evidence might have been excludable if the conspiracy charge had been dropped, nor does he explain why any extraneous evidence might have been prejudicial. It seems clear, moreover, that the evidence of the plan which underlay the substantive offense would have been admissible on the substantive count alone.

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